Supreme Court, U.S.
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No. 99-59

IN THE
Supreme Court of the United States

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Petitioner,

v.

RAMAH NAVAJO SCHOOL BOARD, INC., PATTERSON OIL CO., INC., and GUNDERSON OIL CO., INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW MEXICO COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a State gasoline excise tax nominally imposed on a non-Indian distributor on "receipt" of gasoline from an off-reservation refinery pre-empted when: (1) the distributor responds to a bid solicitation emanating from the reservation and delivers the gasoline to a tribal school board operating under The Indian Self-Determination And Education Assistance Act, 25 U.S.C. §§ 450 to 450n; (2) the tribal entity necessarily absorbs the cost of the tax, thus reducing the amount of federal monies available to operate school, health, and other government programs; and (3) the tax scheme provides deductions for comparable sales to federal agencies and instrumentalities but not to tribal governments?

2. Is the State gasoline tax properly labeled an off-reservation tax between non-Indians when it is imposed at an arbitrary stage in a unified purchase-sale transaction with the tribe which begins and ends on the Indian reservation?

3. Does *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982) control this case because the tax impermissibly burdens and impedes the attainment of the Federal Indian Self-Determination policy?

STATEMENT PURSUANT TO RULE 29.6

The Ramah Navajo School Board, Inc., (RNSB) is a tribally-sanctioned school board and governmental entity of the Navajo Nation, a federally recognized Indian tribe. RNSB is also incorporated as a private, non-profit corporation under the laws of the State of New Mexico.

Neither Gunderson Oil Company, Inc. nor Patterson Oil Company, Inc., the non-Indian distributors, have any parent corporations and no publicly held company owns 10% or more of each corporation's stock. Neither corporation has any interest in this case.

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STATEMENT OF THE CASE

Respondent Ramah Navajo School Board, Inc., (RNSB), in its own name and as assignee of the rights of two gasoline distributors, Gunderson Oil Company, Inc. and Patterson Oil Company, Inc., filed suit in the First Judicial District Court for Santa Fe County, New Mexico, on July 8, 1996, claiming damages for the illegal imposition of state gasoline excise taxes adversely affecting Federally-financed governmental programs under the Indian Self-Determination And Education Assistance Act of 1975 (ISDA), 25 U.S.C. §§ 450-450n. After dismissing claims based on 42 U.S.C. § 1983, the District Court rendered summary judgment for Petitioner Taxation & Revenue Department on September 24, 1997. Thereafter, Respondent RNSB filed notice of appeal to the New Mexico Court of Appeals. On March 4, 1999, that Court affirmed the dismissal of the 42 U.S.C. § 1983 claim but reversed the decision as to the Supremacy Clause (U.S. Const., Art. VI, Cl. 2) claim and remanded for determination of damages. The parties each filed petitions for writ of certiorari to the New Mexico Supreme Court, which denied the Department's petition on April 8, 1999 and RNSB's petition on April 12, 1999.

Respondent is a tribal school board and sanctioned organization of the Navajo Nation for purposes of ISDA. Since 1970 (before the Act was passed) RNSB has been operating a school and other governmental programs for the 2500 members of the Ramah Navajo community in western New Mexico. The Act was passed in 1975. Since then RNSB has been funded through ISDA contracts with monies appropriated by Congress for operation of Indian and related programs. In 1982 it successfully challenged New Mexico's gross receipts tax which was imposed on a construction

project financed by Congress for new school facilities housing RNSB's programs. *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982). (*Ramah I*).

In the late 1980s RNSB began purchasing gasoline from non-Indian, off-reservation-based distributors at wholesale. Typically, RNSB faxed or phoned bid solicitations to known distributors specifying the quantity and type of product desired and a delivery time. Upon award, the distributor would dispatch a tanker to the refinery, load the product, deliver it to Pine Hill on the Ramah Navajo Reservation where RNSB is headquartered, and off-load it. These steps — from bid solicitation to delivery — were often accomplished the same day and almost always within 24 hours.

Gunderson Oil Co. and Patterson Oil Co. are two of the distributors RNSB used regularly for its purchases of gasoline. Petitioner audited each of the distributors and assessed the tax as to deductions taken by each of them on sales to Respondent RNSB. As in *Ramah I* involving the construction project, RNSB paid the assessment or reimbursed the distributor for the tax and received an assignment of any refunds in return.

At the time material to this action, New Mexico's former gasoline tax statute allowed for deductions on sales from distributors to federal agencies or instrumentalities but not to tribes or tribal entities. 7-13-4, NMSA 1978. As a result, a disincentive was placed on tribes' or tribal organizations' use of ISDA to gain control over the operations of federal Indian programs of the Interior Department and the Health and Human Services Department. The tax burden was measurable and significant, some $128,000. In 1997, the

Legislature extended the deduction to Indian nations, tribes or pueblos and their agencies and political subdivision. 7-13-4(c), NMSA 1978 (1998 Repl. Pam.), Laws 1997, Ch. 192. (App. C).

For part of the assessment periods, the New Mexico gasoline statutes also required sellers of petroleum products to include the tax in the selling price of gasoline, thus placing legal incidence on consumers. This requirement was removed from the statutes in 1993 by Act of the Legislature. Laws 1993, Ch. 2, § 2 (App. D) No other material changes to the statutes were made.

Based on general preemption principles of long standing, the Decision below held that the disparate treatment of federal agencies compared with tribes before the 1997 change violated the Supremacy Clause. Citing Laurence H. Tribe, *American Constitutional Law*, § 6-26, at 489 (2d ed. 1988) the Court held that a federal statute preempts state law even if it does not do so expressly, if the state law in question "specifically frustrates fairly narrow and concrete objectives that underlie federal enactments". Relying on *Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982), the Court went on to hold that preemption-by-frustration applies to state taxes as well as other laws and found that the New Mexico tax structure in force during the assessment periods was in "irreconcilable conflict" with the "core objectives of the Self-Determination Act", objectives which had been recognized in *Ramah I* in 1982.

SUMMARY OF THE ARGUMENT

The decision below was correctly decided on the basis of well-established principles of preemption and of Indian

law. The bright line test advocated by Petitioners is not appropriate. The balancing test of *Ramah I* has never been overruled or substantially altered. None of the considerations listed in Rule 17 of this Court obtain. The tax provision found to be impermissible is no longer in effect.

REASONS FOR DENYING THE WRIT

I. THE TAX WAS EFFECTIVELY IMPOSED ON AN ON-RESERVATION TRANSACTION OF AN INDIAN TRIBAL GOVERNMENTAL ENTITY.

At all material times, the former New Mexico gasoline tax seriously impacted the operations of RNSB's federally-contracted school, health, and other governmental programs. Though nominally imposed on non-Indian distributors, the tax directly, predictably, and adversely affected reservation governmental activities of the Respondent authorized and mandated by Congress through ISDA as part of Congress' twenty-five year old policy to promote better education and living conditions for Indians through maximum self-determination. The transaction itself originated and ended on the reservation, characterized by an unbroken series of connected steps from bid solicitation to delivery. The 1993 change switched the legal incidence from the consumer to the distributor, but the tax was still passed along to the consumer. The economic effects on the Respondent tribal entity remained the same. The tax is therefore properly viewed as an on-reservation impost burdening a tribal governing entity operating governmental programs under contracts sanctioned by The Indian Self-Determination Act. The case is thus factually on all fours with *Ramah I* which, therefore, controls. Nothing in *Oklahoma Tax Commission v. Chickasaw*, 515 U.S. 450 (1995), or elsewhere invites

states to manipulate the legal incidence of their taxes to avoid the preemptive effect of the ISDA as found in *Ramah I.*

II. THE NEW MEXICO TAX DISCRIMINATED AGAINST SALES TO INDIAN TRIBES AND THUS SERVED AS A DISINCENTIVE AND IMPEDIMENT TO SELF-DETERMINATION CONTRACTING.

At the same time, the favored treatment of federal agencies and instrumentalities under New Mexico's then tax statute as compared with Indian tribes and entities served to discourage the latter from exercising their ISDA rights by making self-determination contracting more expensive. In a variety of contexts including taxation, this Court has repeatedly held that direct, tangible, and measurable disincentives or impediments erected by states which discourage exercise of federal rights by individuals transgress the Supremacy Clause. *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct 399, 85 L. Ed 581 (1941); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802 (1979); *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 88 S. Ct. 362 (1967); *Xerox*, *supra*. Even if the case were not controlled by *Ramah I,* this aspect of the former state tax structure would be an independent and sufficient basis on which to rest the decision, as the New Mexico Court of Appeals held.

III. THIS COURT HAS NOT ERECTED A BRIGHT-LINE TEST AS POSITED BY PETITIONER.

Contrary to the argument of Petitioner, this Court has not replaced the *Ramah I* balancing test for indirect tax situations with a bright-line test. In fact, this Court has reaffirmed the balancing test. *Cotton Petroleum Co. v. New Mexico*, 490 U.S. 163, 176 (1989):

> Although determining whether federal legislation has pre-empted state taxation of lessees of Indian land is primarily an exercise in examining congressional intent, the history of tribal sovereignty serves as a necessary "backdrop" to that process. (Citations omitted) As a result, questions of pre-emption in this area are not resolved by reference to standards of pre-emption that have developed in other areas of the law, and are not controlled by "mechanical or absolute conceptions of state or tribal sovereignty." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 100 S. Ct. 2578, 2584, 65 L. Ed. 2d 665 (1980). Instead, we have applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case "requires a particularized examination of the relevant state, federal, and tribal interests." *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 838, 102 S. Ct. 3394, 3398, 73 L. Ed. 2d 1174 (1982).

References to ISDA in *Cotton* are pure dicta. ISDA was not involved in that case.

The other citations relied on by Petitioner are equally unsupportive of Petitioner's position. *Chickasaw*, *supra*, 515 U.S. at 464, expressly reserved the question "whether the Tribe's right to self-governance [not pled in that case but central to the claims here] could operate independently to pre-empt the State's ability to tax income earned from work performed for the tribe when the employee does not reside in Indian country." Moreover, *Chickasaw's* comments about bright lines applied to an aspect of the case which involved

a direct tax imposed on a tribal gas station, a tax clearly prohibited by the rule in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) which held that states may not impose direct taxes on Indians living and working on their own reservation. The state had argued that since the tribal outlet passed on the tax to non-Indian consumers the tribe was not being taxed. This is the reverse of what happened here: a non-Indian taxpayer passing on the tax burden to a protected Indian consumer. The Court's comment was not aimed at indirect taxation of tribal governments of the sort involved here, but the converse. *Chickasaw* did not reverse or even mention *Ramah I.*

Arizona Department of Revenue v. Blaze Construction Co., __ U.S. __, 119 S. Ct. 957 (1999), involved a foreign Indian-owned company doing road construction under contract to the Bureau of Indian Affairs, a federal agency. No tribe or tribal entity was a party. No measurable impact on tribal government or on an Indian self-determination program was involved. No ISDA contract was involved. As a result, that case was controlled by *United States v. New Mexico*, 455 U.S. 720 (1982) decided just months before the decision in *Ramah I. United States v. New Mexico* involved the same tax as *Ramah I*, the New Mexico gross receipts or sales tax, a tax comparable in structure to the gasoline taxes at issue here. The only difference between the two cases was that a federal government agency bore the burden of tax in *United States v. New Mexico*, while the burdened entity in *Ramah I*, as here, was a tribal government. That single element, however, produced radically different results, a reflection of the three-way comity interests of states, the Federal government, and tribes which must be taken into consideration whenever tribes are involved. *Ramah I*; *Bracker*, *supra*; *Cf. Kiowa Tribes of Oklahoma v. Hoover*,

150 F.3d 1163 (10th Cir. 1998) (upholding tribal sovereign immunity for off-reservation transactions). Finally, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) predates *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) and *Ramah I* and, in any case, deals with a proprietary activity, a ski resort, unlike the purely governmental activities involved here.

In none of the cases relied on by Petitioner, moreover, was there a comprehensive federal scheme comparable to the Indian Self-Determination scheme central to this case.

The State's reliance on geography and legal incidence therefore disregards the Court's functional test. The State's approach would require an Indian tribe to cut itself off from virtually all off-reservation economic relationships in order to qualify for tax-free status. Such economic isolation is not and cannot reasonably be required. Indian tribes are not islands and cannot be segregated from the social and economic life of this country. Congressional policy aims at restoring and furthering tribal self-government within the mainstream life of this country, not outside it. In turn, the policy requires provision of adequate resources, under tribal control, for vital governmental programs. To achieve Congress' ends, such resources cannot be subject to measurable and debilitating (albeit indirect) state taxes which burden protected reservation tribal activities.

Bright line tests may be practical in other contexts, but the singular three-way relationship of tribes, states, and federal government does not lend itself to such black and white rules. Instead, this Court has wisely fashioned a flexible, uniquely suitable balancing test, established by *Bracker* and *Ramah I,* and refined in *Cotton,* for situations

such as this one where states act in significant yet indirect ways to stifle tribal advance and federal policy. Any other rule has been seen as an invitation to States to manipulate tax laws, just as happened here. The decision below does not depart from that line of authority and represents no significant issue of federal law requiring this Court's intervention.

IV. THE PETITIONER EMPLOYS ARGUMENTS NOT RAISED BELOW AND FACTS NOT OF RECORD.

The new argument based on the interplay of 25 U.S.C. § 450j(k) and the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 481(a), was not preserved below. There was no showing whatever regarding fuel yards, and the state's assertion it was practicable for RNSB to procure gasoline from GSA fuel yards is sheer, belated speculation.

Moreover, the mandate that a tribal agency is deemed an executive agency of the federal government for purposes of procurement of personal property would seem to be an independent ground for the determination below barring a state tax scheme that treats the tribal agency less favorably than the federal government. In an analogous situation, *Seminole Tribe of Florida v. Florida State Department of Revenue*, 720 So. 2d 270, No. 97-3758 (Oct 28, 1998) holds that Indian tribes performing ISDA services function as federal instrumentalities, hence are exempt from Florida sales and use taxes that on their face exempt only state and federal governments.

The Petitioner also misunderstands the complexities of the funding provisions of ISDA. The direct cost provisions it cites do not apply to the school operations of RNSB which are funded by formula under 25 U.S.C. §§ 2007 and 2008, a formula which does not include provisions for paying state taxes. (Appendix A). Moreover, the indirect costs and contract support provisions are in controversy nationwide at the present time because of Congress' failure to appropriate sufficient funds. *See, e.g., Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Shoshone-Bannock Tribe v. Shalala*, 988 F. Supp 1306 (D. OR. 1997), *mod. oth. grnds.*, 999 F. Supp. 1395 (D. OR. 1998); and *Appeals of Alamo Navajo School Board, Inc. and Miccosukee Corporation*, U.S. Dept. of the Interior, IBCA 3463-3466 and IBCA 3560-3562, 98-2 BCA, 29, 831 and 29, 832 (pending appeal in the Federal Circuit Court of Appeals, Docket No. 98-1457 consolidated with Docket No. 99-1033); Appeal of Cherokee Nation of Oklahoma, IBCA Docket No. 3877-3879/98. Further, *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) is not relevant since that was an administrative law decision dealing with an arbitrary rule imposed by the Secretary reducing contract support for two ISDA contractors who missed an application deadline. That case has absolutely nothing whatsoever to do with administrative costs generally or their general availability under annual appropriations. The suggestion that RNSB should sue the BIA is, therefore, not useful.

Another new argument, not raised below, based on supposed tax benefits to RNSB, pp. 12-13, is unsupported by any evidence in the record. This case was decided on cross motions for summary judgment. Petitioner did not submit any proofs to counter the affidavit of Jim Hooper, Jr. (Appendix B).

Finally, the New Mexico tax provision that formerly treated Indian governmental agencies less favorably than federal agencies has been rectified by the New Mexico legislation. The differential treatment which was properly found to be impermissible no longer exists. (Appendix C).

CONCLUSION

FOR THESE REASONS, the Petition for Certiorari should be denied.

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